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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. a. Do Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (1976), still apply to the curtailment plans of interstate natural gas pipelines after the enactment of Title IV of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3391-3394 (Supp. IV 1980)?

b. If so, is the rule promulgated by the Federal Energy Regulatory Commission to implement Section 401 of Title IV, 15 U.S.C. § 3391 (Supp. IV 1980), unlawful because of its conflict with the standards and procedures of Sections 4 and 5 of the Natural Gas Act?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below are as follows: Air Products and Chemicals, Inc.; Alabama Gas Corporation; Allied Chemical Corporation; American Bankers Association; American Bankers Association; American Gas Association; American Industrial Clay Company of Sandersville and Georgia Kaolin Company; American Meat Institute; American Paper Institute, Inc.; American Plywood Association; American Seed Trade Association, Inc.; American Sugar Cane League of the USA, Inc.; American Textile Manufacturers Institute, Inc.; Armour & Company; Associated Natural Gas Co.; Atlanta Gas Light Company; Biscuit and Cracker Manufacturers' Association; Brooklyn Union Gas Company; Columbia Gas Transmission Corp.; Columbia Nitrogen Corp. and NIPRO, Inc.; Consolidated Edison Company of New York; Consolidated Gas Supply Corporation; Corn Refiners Association, Inc.; Distilled Spirits Council of U.S., Inc.; East Tennessee Natural Gas Company; Eli Lilly and Company; Entex, Inc.; Farmland Industries, Inc.; Federal Energy Regulatory Commission; The Fertilizer Institute; First Mississippi Corporation; General Service Customer Group; Glass Packing Institute; Great Western Sugar Company; High Plains Gas Consumer Group; Honorable John R. Block, Secretary of Agriculture; Kansas-Nebraska Natural Gas Company, Inc.; Midwestern Gas Transmission Company; Mississippi River Transmission Corp.; National Council of Farmer Cooperatives; National Food Processors Association; National Independent Meat Packers Association; National Soybean Processors Association; New Jersey Natural Gas Company; Northern Natural Gas Co.; Pacific Gas & Electric Company; Process Gas Consumers Group; Public Service Commission of the State of New York; Public Service Company of North Carolina, Inc., and North Carolina Natural Gas

Corporation; Public Service Electric and Gas Company; Retail Bakers of America; Riceland Foods; Southern California Gas Company; Southern Natural Gas Company; State of Louisiana; State of Oklahoma; State of Texas; Tennessee Gas Pipeline Company; Terra Chemicals International, Inc.; Texas Gas Transmission Corp.; Transcontinental Gas Pipe Line Corp.; U.S. Brewers Association, Inc.; United States Department of Agriculture; United Distribution Companies; United Gas Pipe Line Company; United States Department of Energy; Washington Gas Light Company; West Texas Gas, Inc.

The statement of petitioner United Gas Pipe Line's affiliates required by Rule 28.1 of this Court is contained in note 1 to United's Motion to Extend Time to File Petition for Certiorari filed herein on December 13, 1982.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

United Gas Pipe Line Company ("United") petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case to the extent that such judgment and opinion uphold the Federal Energy Regulatory Commission's[1] Order No. 29.[2]

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[1] Both the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, are referred to herein as the "Commission."

[2] J.A. 139-327. "J.A." as used herein refers to the separate Joint Appendix of petitioners United and State of Louisiana. Unless otherwise expressly indicated, "Order No. 29" as used herein refers to the Order No. 29 series, i.e., Order No. 29, issued May 2, 1979 (J.A. 139-242), Order No. 29-A, issued June 15, 1979 (J.A. 243-253), Order No. 29-B, issued July 20, 1979 (J.A. 254-268), and Order No. 29-C, issued Oct. 22, 1979 (J.A. 269-327), including the regulations promulgated by such orders, i.e., 18 C.F.R. §§ 281.201-281.215 (1982).

OPINIONS BELOW

The initial opinion of the Court of Appeals (J.A. 1-105), and the opinion of the Court of Appeals on rehearing en banc (J.A. 106-38) are not yet reported. The portions of the opinion relating to the issue involved here appear at J.A. 28-35 and J.A. 116 n.3. The orders of the Federal Energy Regulatory Commission appear at J.A. 139-327.

JURISDICTION

The initial judgment of the Court of Appeals (J.A. 328-30) was entered on July 29, 1981. The portions of the judgment and opinion that are pertinent here were vacated on November 13, 1981 by the order of the Court of Appeals granting rehearing en banc (J.A. 137-38). The judgment of the Court of Appeals on rehearing en banc (J.A. 331-33) reinstating the portions of the judgment and opinion pertinent here (J.A. 116 n.3) was entered on October 1, 1982. On December 15, 1982, Chief Justice Burger issued an extension of the time for filing a petition for a writ of certiorari to and including January 29, 1983. The jurisdiction of this Court is invoked under 15 U.S.C. § 717r(b) (1976), 28 U.S.C. § 1254(1) (1976), and 15 U.S.C. § 3416(a)(4) (Supp. IV 1980).

STATUTES INVOLVED

The statutes principally involved are Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (1976), and Sections 401, 403(b) and 502(c) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3391, 3393(b), and 3412(c) (Supp. IV 1980). Also involved are Section 16 of the Natural Gas Act, 15 U.S.C. § 717o (1976); Sections 402 and 501 of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3392 and 3411 (Supp. IV 1980); and Sections 402(a)(1)(E) and 402(h) of the Department of Energy Organization Act 42 U.S.C. §§ 7172(a)(1)(E) and 7172(h)

(Supp. IV 1980). Because of their length, all of these statutory materials are set out in the Appendix to this petition.[3]

STATEMENT

A. Nature Of This Case

This case involves the statutory standards applicable to the curtailment plans of interstate natural gas pipelines. A curtailment plan is the mechanism contained in a pipeline's tariff that allocates gas supplies among the pipeline's customers in times of shortage.

Natural gas curtailments and the standards by which curtailment plans are structured are issues of enormous practical importance. Natural gas furnishes more than 25 percent of the nation's energy supplies.[4] Yet, during the 1970's, natural gas shortages reached crisis proportions. For example, during the 1976-77 winter, curtailments exceeded 2 trillion cubic feet of natural gas (compared with actual deliveries of 8.7 trillion cubic feet).[5] Thus, in times of shortage, natural gas curtailment plans and the standards in accordance with which they are structured are of critical importance to natural gas consumers and the pipelines that serve them.

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[3] The Appendix that is attached to this petition is referred to hereinafter as "Appendix to Petition."

[4] Calculated from U.S. Dep't of Energy, Energy Information Admin., DOE/EIA-0035 (82/09), *Monthly Energy Review, September 1982*, at 8.

[5] U.S. Dep't of Energy, Energy Information Admin., DOE/EIA-0150, *Natural Gas Deliveries and Curtailments to End-Use Customers and Potential Needs for Additional Alternate Fuels—1978-1979 Heating Season (November-March)*, at 6, Table 1.

The NGPA was enacted largely in response to the natural gas shortages and curtailments of the 1970's. One part of the Act, Title IV, 15 U.S.C. §§ 3391-3394 (Supp. IV 1980), deals directly with interstate pipelines' curtailment plans. The issue in this proceeding is whether Title IV displaces Sections 4 and 5 of the Natural Gas Act insofar as those provisions establish the standards and procedures applicable to the curtailment plans of interstate natural gas pipeline companies. As shown below, the Commission's Order No. 29 would change the basic nature of the formulation and implementation of pipeline curtailment plans. Order No. 29 was promulgated by the Commission and sustained by the court below on the theory that Title IV of the NGPA controls over Sections 4 and 5 of the Natural Gas Act to the extent necessary to justify Order No. 29.[6] Since Title IV of the NGPA is thus held to support a regulation that effectively displaces Sections 4 and 5 of the Natural Gas Act, this case turns upon the relationship between the two statutes.

B. Curtailment Plans Under The Natural Gas Act

Under the Natural Gas Act, there are two permissible means of implementing pipeline curtailment plans. First, under Section 4 of the Act,[7] pipelines may file tariffs containing curtailment plans which are thereupon subject to Commission review pursuant to the requirements and procedures of Section 4.[8] Second, the Commission is authorized to impose its own curtailment plan in compliance with the procedures of Section 5 of the Natural Gas Act.[9]

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[6] J.A. 145-46, 290-93 (Commission); J.A. 116 n.3 (Court of Appeals).

[7] 15 U.S.C. § 717c (1976), Appendix to Petition at 1a-3a.

[8] FPC v. Louisiana Power & Light Co., 406 U.S. 621, 643-44 (1972).

[9] 15 U.S.C. § 717d (1976), Appendix to Petition at 3a-4a.

Under Section 4, a pipeline has the responsibility for filing the tariff containing its curtailment plan and the Commission has the responsibility of review.[10] The tariff must meet the substantive requirements of Section 4 of the Natural Gas Act, i.e., the tariff must not:

> (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or
>
> (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.[11]

This Court has specifically approved the use of the Section 4 procedure, noting that it takes advantage of "each pipeline's unique knowledge" of its own system.[12] In its review of a curtailment plan in a Section 4 tariff filing, the Commission is required to analyze the actual impact of the curtailment plan upon the pipeline's customers in ascertaining whether it meets Section 4 standards.[13]

As an alternative to the Section 4 procedure, the Commission may implement a curtailment plan of its own pursuant to Section 5 of the Natural Gas Act. Under Section 5, when the Commission finds that a pipeline's

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[10] *Cf.* United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 338-39 (1956).

[11] Natural Gas Act § 4(b), 15 U.S.C. § 717c(b) (1976), Appendix to Petition at 1a.

[12] FPC v. Louisiana Power & Light Co., 406 U.S. 621, 645 (1972); *see also, e.g.*, Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 43 (D.C. Cir. 1974).

[13] State of North Carolina v. FERC, 584 F.2d 1003, 1014 (D.C. Cir. 1978).

existing curtailment tariff is "unjust, unreasonable, unduly discriminatory, or preferential," the Commission can determine and prescribe by order a "just and reasonable" plan. However, to establish such a plan, even for a single pipeline, the Commission's order can issue only "after full hearing and must include a statement of reasons based upon findings of fact which are supported by substantial evidence in the record."[14] The Commission's reasoning based upon substantial evidence after hearing must "consider the impact that a plan actually does or will have on ultimate consumers."[15]

Under the Natural Gas Act, the courts consistently rejected as contrary to the requirements of Sections 4 and 5 the Commission's efforts to establish a single type of curtailment plan applicable uniformly to all pipelines. The Commission's directive with respect to the appropriate structure of curtailment plans was permitted to stand only as a nonbinding statement of policy—i.e., one that carried no presumption of correctness for application to any particular pipeline—and the Commission was required to support its plan in any specific application just as if the policy statement had not been issued.[16] The courts consistently held that the imposition of a curtailment plan upon a particular pipeline required an analysis of the plan's impact on that pipeline's customers.[17]

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[14] American Smelting & Refining Co. v. FPC, 494 F.2d 925, 933 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974).

[15] Sebring Utilities Comm'n v. FERC, 591 F.2d 1003, 1012 n.32 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979).

[16] Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).

[17] State of North Carolina v. FERC, 584 F.2d 1003, 1014 (D.C. Cir. 1978); Arkansas Power & Light Co. v. FPC, 517 F.2d 1223, 1233-34 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 40 (D.C. Cir. 1974); Rhode Island Con-

C. Title IV Of The NGPA

The provisions of the NGPA relating directly to curtailment are contained in its Title IV which, to the extent pertinent here, requires certain defined curtailment treatment for "essential agricultural uses" and for "essential industrial process and feedstock uses."[18] Section 401 of the NGPA, the provision upon which Order No. 29 is based, requires that, to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any "essential agricultural use" for which no alternate fuel is available except as necessary to meet the requirements of "high-priority users," as defined in the statute.[19] The mandate of the NGPA that is pertinent here goes no further than this, i.e., to provide that the agencies, to the maximum extent practicable, shall not permit interstate pipeline curtailment plans to accord certain defined agricultural users treatment less favorable than that specified.

Under Section 403(b) of the NGPA, the Commission is to implement its rules under Section 401 pursuant to its previously existing authority "to establish, review, and enforce curtailments under the Natural Gas Act."[20] Although there is relatively little legislative history in connection with Title IV, presumably because of the lack of

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sumers' Council v. FPC, 504 F.2d 203, 208-09 (D.C. Cir. 1974); State of Louisiana v. FPC, 503 F.2d 844, 871-72 (5th Cir. 1974); American Smelting & Refining Co. v. FPC, 494 F.2d 925, 942 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974).

[18] Appendix to Petition at 5a-7a.

[19] *Id.* at 5a-6a.

[20] *Id.* at 8a.

controversy surrounding a relatively limited provision, the history that does exist shows that Congress intended that the curtailment status quo be disrupted as little as possible consistent with the establishment of the new treatment accorded certain users by Sections 401 and 402.[21]

D. Order No. 29

The Commission promulgated Order No. 29 with the sole express purpose of implementing Section 401.[22] Yet Order No. 29 prescribes what amounts to a detailed, comprehensive curtailment plan designed by the Commission for application to all pipelines subject to the order. The regulations in Order No. 29 require each pipeline to file tariffs providing that if the pipeline is in curtailment, natural gas will be delivered in accordance with the provisions of the order.[23] No variations from Order No. 29 will be allowed for any pipeline except through "special adjustment" procedures under Section 502(c) of the NGPA.[24] In an order subsequent to Order No. 29, the Commission has made clear that all pipeline curtailment plans must comply in all respects with Order No. 29 unless the Commission has expressly approved a variance from it:

> [T]he Commission also wishes to emphasize that it has consistently taken the position that unless one has received Commission authorization to deviate

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[21] *Id.* at 11a.

[22] 18 C.F.R. § 281.201 (1982), J.A. 197; *see also* J.A. 139-149.

[23] 18 C.F.R. § 281.204(a) (1982), J.A. 204-05.

[24] Appendix to Petition at 9a-10a; J.A. 284-85, 289, 292.

from Order 29, it must comply with Order 29—in full.[25]

The Commission's Order No. 29 plan is comprehensive. It is intended to cover all aspects of a pipeline's curtailments, not just the treatment accorded agricultural users.[26] Each pipeline's entire plan is prescribed in "a particular and detailed manner."[27]

Under Order No. 29 the composition of a pipeline's curtailment priorities is determined on the basis of each pipeline's existing curtailment plan,[28] so that its customers' requirements, or entitlements, are derived from information gathered for a historic base period, usually a twelve-month test period in the early 1970's. Except for a pipeline whose existing plan contained a "rolling base period," there is no provision for updating the base period requirements data for the pipeline's customers with more current information. The use of the historic data is mandatory.

Moreover, Order No. 29 contains directions for "attribution" of high-priority and essential agricultural use requirements among suppliers.[29] Pipelines in their curtailment plans are required to adhere without variance to the method of allocation prescribed, and to curtail only in accordance with their resulting "index of

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[25] Arkansas Louisiana Gas Co., Docket No. TC79-134, Order Denying Rehearing and Request for Interim Stay of Order No. 29 and Granting Intervention, issued September 10, 1979 (mimeo at 3).

[26] 18 C.F.R. § 281.204(a) (1982), J.A. 204-05.

[27] J.A. 292.

[28] 18 C.F.R. §§ 281.206, 281.207 (1982), J.A. 211-20; *see also* J.A. 162, 178, 182.

[29] 18 C.F.R. §§ 281.206, 281.209 (1982); J.A. 211-16, 224-31.

entitlements."[30] There is no recognition of, or provision for, the differing impact of curtailment on customers that depend upon the pipeline for their total supply (full requirements customers) and those that have other sources of supply (partial requirements customers).

E. United Gas Pipe Line Company

United Gas Pipe Line Company ("United") is an interstate pipeline company whose system lies in Texas, Louisiana, Mississippi, Alabama, and Florida. Neither United nor (to United's knowledge) any other interstate pipeline is curtailing at present. The Commission recently approved a curtailment plan for United's system,[31] but certain customers have sought court review of the Commission's approval.[32] Whatever the court's action on review, Order No. 29 is by its terms applicable to any effort by United to change its existing plan or to file a new plan.[33]

F. Proceedings In The Court Below

Upon the Commission's denial of rehearing,[34] various parties petitioned the court below for review of Order No. 29, pursuant to Section 19(b) of the Natural Gas Act and Section 506(a)(4) of the NGPA. These petitions were consolidated with proceedings brought to review other

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[30] 18 C.F.R. §§ 281.205(b), 281.211, 281.212 (1982), J.A. 210, 232-39.

[31] United Gas Pipe Line Company, Opinion No. 150, 21 F.E.R.C. ¶ 61,016, *reh'g denied*, 21 F.E.R.C. ¶ 61,224 (1982).

[32] Mississippi Power & Light Co., *et al.* v. FERC, No. 82-4444 (5th Cir. filed Jan. 17, 1983).

[33] 18 C.F.R. §§ 281.202, 281.204(a), J.A. 197-98, 204-05.

[34] J.A. 321-22.

orders of the Commission, of the United States Department of Agriculture, and of the United States Department of Energy issued under Section 401 of the NGPA. Accordingly, the court below considered in its decision many issues besides the validity of Order No. 29.

After briefing and oral argument, a panel of the court below issued its decision on July 29, 1981.[35] On petitions for rehearing and rehearing en banc, the court vacated the panel's decision on two issues, including the issue involved in this petition for certiorari, and granted rehearing en banc.[36] On October 1, 1982, after additional briefing and oral argument, the court en banc issued its decision[37] which, inter alia, reinstated the opinion and judgment of the panel on the issue involved in this petition for certiorari.[38]

REASONS FOR GRANTING THE PETITION

This case presents an issue of critical legal and practical importance not previously addressed by this Court, i.e., the relation between Title IV of the NGPA and Sections 4 and 5 of the Natural Gas Act as they apply to interstate natural gas pipelines' curtailment plans. It is essential for this Court to resolve this issue because the Commission, citing the alleged imperatives of Title IV, has promulgated a rule of general applicability that is contrary to the standards and procedures of Sections 4 and 5 of the Natural Gas Act which have heretofore governed pipeline curtailment plans.

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[35] *Id.* at 1-105.

[36] *Id.* at 137-38.

[37] *Id.* at 106-38.

[38] *Id.* at 116 n.3.

The Commission's rule cannot be justified on the basis of any new authority conferred by the NGPA or by the necessity of such a rule in order to carry out the mandate of specific provisions of the NGPA. Nor is the rule supportable as an exercise of the Commission's rulemaking authority. Yet the rule would eliminate the affirmative obligation imposed by the Natural Gas Act to analyze the actual impact of a proposed curtailment plan on a pipeline's customers to ensure that it is nondiscriminatory in its operation and that it otherwise meets the substantive requirements of the Natural Gas Act. Moreover, the nature of the rule could have the effect of insulating the Commission's decisions on curtailment plans from judicial review. Also, the rule would displace the procedures established by the Natural Gas Act for the formulation and implementation of curtailment plans.

1. Order No. 29 conflicts with the Natural Gas Act requirements in two important respects. First, Order No. 29 permits—and indeed requires—the implementation of pipeline curtailment plans whether or not they meet the substantive requirements of Sections 4 and 5 of the Natural Gas Act. The Commission has thus bypassed the affirmative obligation imposed upon it under the Natural Gas Act to determine that a pipeline curtailment plan, to be put into effect, must meet the antidiscrimination provision and other substantive requirements of Sections 4 and 5.

It cannot be maintained that the curtailment plan contained in Order No. 29 presumptively meets the standards of Sections 4 and 5. For example, the plan fails to take into account the different impact of curtailments on customers that are wholly dependent upon a pipeline's gas as opposed to others that have more than one source of supply. Yet the courts have recognized the need for

curtailment plans to accommodate such differing impacts and have rejected curtailment plans like the Order No. 29 paradigm as applied to a particular pipeline because as so applied such plans violated the Natural Gas Act standards.[39] Order No. 29 provides no basis for assuming that this is an isolated problem or that the type of curtailment plan incorporated in Order No. 29 would be nondiscriminatory except in unusual circumstances. Indeed, Order No. 29 contains no basis whatsoever for adopting its plan as the standard plan and requiring any variance to be justified by a showing of special hardship, inequity or undue burden under Section 502(c) of the NGPA.

Second, under Order No. 29, the procedures of the Natural Gas Act are totally disregarded. Whereas under Section 4 pipelines have the right and the responsibility to file curtailment tariffs and the Commission has the responsibility for reviewing them, under Order No. 29 the Commission has completely preempted this procedure by prescribing its own detailed curtailment plan. It has also required each pipeline subject to the order to adhere to such a plan unless it can persuade the Commission that it should grant a special adjustment under Section 502(c) of the NGPA upon a showing that such is "necessary to prevent special hardship, inequity or an unfair distribution of burdens."[40] Moreover, whereas a tariff goes into effect within six months under Section 4(e), there is no time limit for Commission action under Section 502(c). Thus, the Order No. 29 procedures are flatly inconsistent with those of Sections 4 and 5 of the Natural Gas Act.

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[39] State of North Carolina v. FERC, 584 F.2d 1003, 1013-14 (D.C. Cir. 1978).

[40] NGPA § 502(c), 15 U.S.C. 3412 (Supp. IV 1980), Appendix to Petition at 9a-10a.

2. The NGPA confers no new authority on the Commission with respect to curtailments except to the extent required to implement the prescribed treatment for agricultural and for process and feedstock users. Indeed, in Section 403(b) of the NGPA, it is made explicit that the Commission is to implement Title IV pursuant to its existing authority under the Natural Gas Act.[41] There is no basis whatsoever for an argument that the relatively limited curtailment changes called for in Title IV were intended to displace the existing curtailment standards and procedures of the Natural Gas Act.

3. Implicit in the Commission's justification of its rule and in the holding of the court below sustaining it is the assumption that it is possible to implement Section 401 of the NGPA *only* by overriding the requirements of the Natural Gas Act. However, there is no basis for this view. The Commission has ample means for according the treatment required by Section 401 without prescribing a comprehensive curtailment plan to be adopted by all pipelines.

For example, the Commission's interim rule implementing Section 401 directed pipelines to amend their tariffs to provide special relief from curtailment where such relief would be needed to assure delivery of gas to agricultural and high-priority users who would otherwise be curtailed.[42] The specific means of achieving the re-

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[41] *Accord* Section 402(a)(1)(E) of the Department of Energy Organization Act, 42 U.S.C. § 7172(a)(1)(E) (Supp. IV 1980), Appendix to Petition at 10a.

[42] Interim Curtailment Rule, Interim Regulation for the Implementation of Section 401 of the Natural Gas Policy Act of 1978, Docket No. RM79-13, issued March 6, 1979, 44 Fed. Reg. 13464 (1979).

quired result were left to each pipeline. Thus, the Section 401 treatment was assured without violation of the standards and procedures of Sections 4 and 5 of the Natural Gas Act. This rule was implemented with no apparent problems.

Alternatively, the Commission could promulgate a rule that requires pipelines to file revised curtailment tariffs that incorporate the Section 401 treatment. This would assure compliance with Section 401 and would preserve Commission and court review subject to the standards and pursuant to the procedures of Sections 4 and 5 of the Natural Gas Act. This method could be no more burdensome than Order No. 29 itself since any pipeline could use an Order No. 29 plan if appropriate.

Various other methods might well be available for the lawful implementation of Section 401. The point is that nothing in the nature of Section 401 requires the sort of detailed specification of all the contents of pipeline cutailment plans that is contained in Order No. 29. Nor does anything in Section 401 inherently require the Commission to bypass the standards and procedures of Sections 4 and 5 of the Natural Gas Act.

4. Order No. 29 is not supportable as a valid exercise of the Commission's rulemaking authority. The statutes cited by the court below[43] merely establish the Commission's authority to promulgate rules and regulations to implement the statutes. They do not confer authority to promulgate rules that bypass the statutory requirements

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[43] J.A. 34 n.27. *I.e.*, Natural Gas Act § 4(c), 15 U.S.C. § 717c(c) (1976), Appendix to Petition at 1a; Natural Gas Act § 16, 15 U.S.C. § 717o (1976), Appendix to Petition at 4a; Department of Energy Organization Act § 402(h), 42 U.S.C. § 7172(h) (Supp. IV 1980), Appendix to Petition at 10a.

as Order No. 29 does. Similarly, the cases cited[44] do not support the authority claimed in Order No. 29. *Permian Basin Area Rate Cases* held that, when the Commission had established an area rate for producers in a Section 5(a) proceeding, it could also restrict producers from filing for a rate change above the ceiling for a reasonable period of time.[45] Here, the Commission has made no Section 5(a) finding at all. Moreover, the Order No. 29 restrictions have no time limit. Similarly, *FPC* v. *Texaco Inc.* upheld the Commission's authority to prohibit in producer rate filings certain defined impermissible price escalation provisions on the ground that the Commission had properly determined that under no circumstances would such provisions in a rate filing be approved.[46] This is quite different from prescribing in detail the curtailment tariff the pipeline must file. It is also pertinent to note that both *Permian* and *Texaco* involved producer rate regulation where extraordinary procedures were often required to keep the Commission's task within manageable bounds. Finally, as discussed above, *Pacific Gas & Electric Co.* v. *FPC* affirmed the Commission's authority to promulgate a general statement of policy *as such*.[47] Pipelines were by no means precluded from filing curtailment tariffs that varied from the policy stated.

The Commission's rulemaking authority is "of an implementary rather than substantive character" and

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[44] J.A. 35 n.28. *I.e.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968); FPC v. Texaco Inc., 377 U.S. 33 (1964); Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

[45] 390 U.S. 747, 777-81 (1968).

[46] 377 U.S. 33, 39-45 (1964).

[47] 506 F.2d 33, 41 (D.C. Cir. 1974).

does "not confer independent authority to act."[48] The special authority under "section 16 does not itself grant independent powers but merely provides for implementation of the core sections of the Natural Gas Act."[49] Indeed, the argument that the Commission's rulemaking authoity justifies Order No. 29 stands on its head the concept of rulemaking as statutory implementation. What that argument amounts to is that the agency need not comply with the applicable statutory standards if the agency proceeds by rulemaking. Indeed, far from "particularizing statutory standards,"[50] the Commission's rule is diametrically opposed to the applicable statutory requirements.

5. Order No. 29 contemplates that the curtailment plan it contains may be modified if the pipeline obtains an adjustment in accordance with Section 502(c) of the NGPA upon a showing of "special hardship, inequity, or an unfair distribution of burdens." This procedure, however, is no valid substitute for the standards and procedures of Sections 4 and 5 of the Natural Gas Act.

First, as discussed above, under the Natural Gas Act there is an affirmative obligation to ensure that curtailment plans are nondiscriminatory and that they otherwise comply with the substantive standards of Sections 4 and 5. Order No. 29 would eliminate this obligation. In-

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[48] New England Power Co. v. FPC, F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974).

[49] American Smelting & Refining Co. v. FPC, 494 F.2d 925, 933 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974); *accord* Texaco, Inc. v. FPC, 474 F.2d 416, 420 (D.C. Cir. 1972), *vacated and remanded*, 417 U.S. 380 (1974).

[50] FPC v. Texaco Inc., 377 U.S. at 39.

deed, a pipeline's curtailment plan is valid under Order No. 29 if it follows mechanically the plan there prescribed without regard to the impact of the plan on the pipeline's customers.

One of the most serious impacts of this rule is the possibility that it would insulate the Commission's decisions on curtailment plans from judicial review. For a Commission curtailment decision to be challenged, the aggrieved party would presumably be required to show that the plan did not conform with the Order No. 29 paradigm or that the Commission had abused its discretion in failing to grant an adjustment under Section 502(c). This is a radical departure from the standard of review under the Natural Gas Act, which permits aggrieved parties to challenge curtailment plans on the ground that they do not meet the substantive requirements of Sections 4 and 5.

The second problem with this aspect of Order No. 29 is that it violates the procedural requirements of Sections 4 and 5 of the Natural Gas Act. Under the Natural Gas Act, the Commission has no authority to set up its own curtailment plan and require parties to justify any variance from it.[51] Yet it is clear that in Order No. 29 the Commission intends to do just this. Moreover, although Order No. 29 and the decision of the court below appear to be at variance on this point,[52] it was clearly the intent of Order No. 29 to override the tariff procedures of Sections 4 and 5

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[51] *E.g.*, Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

[52] *Compare* J.A. 35 n.29, *with* J.A. 286-93.

of the Natural Gas Act. As stated by the Commission in Order No. 29-C:

> Interstate pipelines may file plans under section 4 of the Natural Gas Act that deviate from Order 29. But such a filing by itself would not waive the requirement to file in accordance with Order 29 *unless* the pipeline has received an adjustment under Section 502(c). A deviant plan filed under section 4 of the NGA cannot go into effect until the requirements of Order 29 have been waived.[53]

Thus, the Commission's contemplated use of the Section 502(c) procedure does not cure Order No. 29's conflict with Sections 4 and 5 of the Natural Gas Act. Nor is it an answer to this problem to say, as the court below implied,[54] that the rule should not be upset unless it is shown that the agency has actually abused its authority under it. The issue here is the validity of the rule itself and whether it contains permissible standards and procedures for the formulation of pipeline curtailment plans.

CONCLUSION

For the reasons stated above, United asks that a writ of certiorari issue to review the judgment and opinion of the

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[53] J.A. 292 (emphasis in original).

[54] J.A. 33-34.

Court of Appeals of the District of Columbia Circuit to the extent that they uphold the Commission's Order No. 29.

Respectfully submitted,

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January 29, 1983

I. STATUTES

NATURAL GAS ACT

SEC. 4. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by

filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose

behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [15 U.S.C. § 717c (1976)]

SEC. 5. Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [15 U.S.C. § 717d (1976)]

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

SEC. 16. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [15 U.S.C. § 717o (1976)]

NATURAL GAS POLICY ACT OF 1978

Title IV—Natural Gas Curtailment Policies

SEC. 401. Natural Gas For Essential Agricultural Uses.

(a) GENERAL RULE.—Not later than 120 days after the date of the enactment of this Act, the Secretary of Energy shall prescribe and make effective a rule, which may be amended from time to time, which provides that, notwithstanding any other provision of law (other than subsection (b)) and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless such curtailment—

(1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (c); or

(2) is necessary in order to meet the requirements of high-priority users.

(b) CURTAILMENT PRIORITY NOT APPLICABLE IF ALTERNATIVE FUEL AVAILABLE.—If the Commission, in consultation with the Secretary of Agriculture, determines, by rule or order, that use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for any agricultural use of natural gas, the provisions of subsection (a) shall not apply with respect to any curtailment of deliveries for such use.

(c) DETERMINATION OF ESSENTIAL AGRICULTURAL USE REQUIREMENTS.—The Secretary of Agriculture shall certify to the Secretary of Energy and the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential agricultural uses in order to meet the requirements of full food and fiber production.

(d) AUTHORITY OF SECRETARY OF AGRICULTURE TO INTERVENE.—The Secretary of Agriculture may intervene as a matter of right in any proceeding before the Commission which is

conducted in connection with implementing the requirements of the rule prescribed under subsection (a).

(e) LIMITATION.—The Secretary of Agriculture may not exercise any authority under this section for the purpose of restricting the production of any crop.

(f) DEFINITIONS.—For purposes of this section—

(1) ESSENTIAL AGRICULTURAL USE.—The term "essential agricultural use", when used with respect to natural gas, means any use of natural gas—

(A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or

(B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food, which the Secretary of Agriculture determines is necessary for full food and fiber production.

(2) HIGH-PRIORITY USER.—The term "high-priority user" means any person who—

(A) uses natural gas in a residence;

(B) uses natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day;

(C) uses natural gas in any school, hospital, or similar institution; or

(D) uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property.
[15 U.S.C. § 3391 (Supp. IV (1980)]

SEC. 402. Natural Gas For Essential Industrial Process And Feedstock Uses.

(a) GENERAL RULE.—The Secretary of Energy shall prescribe and make effective a rule which provides that, notwithstanding any other provision of law (other than subsection (b)) and to the maximum extent practicable, no interstate pipeline

may curtail deliveries of natural gas for any essential industrial process or feedstock use, unless such curtailment—

(1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (c);

(2) is necessary in order to meet the requirements of high-priority users; or

(3) is necessary in order to meet the requirements for essential agricultural uses of natural gas for which curtailment priority is established under section 401.

(b) CURTAILMENT PRIORITY APPLICABLE ONLY IF ALTERNATIVE FUEL NOT AVAILABLE.—The provisions of subsection (a) shall apply with respect to any curtailment of deliveries for any essential industrial process or feedstock use only if the Commission determines that use of a fuel (other than natural gas) is not economically practicable and that no fuel is reasonably available as an alternative for such use.

(c) DETERMINATION OF ESSENTIAL INDUSTRIAL USE REQUIREMENTS.—The Secretary of Energy shall determine and certify to the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential industrial process and feedstock uses (other than those referred to in section 401(f)(1)(B)).

(d) DEFINITIONS.—For purposes of this section—

(1) ESSENTIAL INDUSTRIAL PROCESS OR FEEDSTOCK USE.—The term "essential industrial process or feedstock use" means any use of natural gas in an industrial process or as a feedstock which the Secretary determines is essential.

(2) HIGH-PRIORITY USER.—The term "high-priority user" has the same meaning as given such term in section 401(f)(2). [15 U.S.C. § 3392 (Supp. IV 1980)]

SEC. 403. Establishment And Implementation Of Priorities.

(a) ESTABLISHMENT OF PRIORITIES.—The Secretary of Energy shall prescribe the rules under sections 401 and 402 pursuant to his authority under the Department of Energy Organization Act to establish and review priorities for curtailments under the Natural Gas Act.

(b) IMPLEMENTATION OF PRIORITIES.—The Commission shall implement the rules prescribed under sections 401 and 402 pursuant to its authority under the Department of Energy Organization Act to establish, review, and enforce curtailments under the Natural Gas Act. [15 U.S.C. § 3393 (Supp. IV 1980)]

SEC. 404. Limitation On Revoking Or Amending Certain Pre-1969 Certificates Of Public Convenience And Necessity.

(a) GENERAL RULE.—The Commission may not, during the 10-year period beginning on the date of the enactment of this Act, revoke or amend any certificate of public convenience and necessity issued before January 1, 1969, under section 7 of the Natural Gas Act for the transportation of natural gas owned by any electric utility except upon the application of the person to whom such certificate was issued.

(b) COMMISSION CURTAILMENT AUTHORITY.—The limitation under subsection (a) shall not affect the authority of the Commission to enforce any curtailment of deliveries of natural gas under the Natural Gas Act. [15 U.S.C. § 3394 (1980)]

SEC. 501. General Rulemaking Authority.

(a) IN GENERAL.—Except where expressly provided otherwise, the Commission shall administer this Act. The Commission, or any other Federal officer or agency in which any function under this Act is vested or delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and

rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act.

(b) AUTHORITY TO DEFINE TERMS.—Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this Act. Any such definition shall be consistent with the definitions set forth in this Act.

(c) DELEGATION OF CERTAIN DETERMINATIONS.—The Commission may delegate to any State agency (with the consent of such agency) any of its functions with respect to sections 105, 106(b), and 109(a)(1) and (3). [15 U.S.C. § 3411 (Supp. IV 1980)]

SEC. 502. Administrative Procedure.

(a) ADMINISTRATIVE PROCEDURE ACT.—Subject to subsection (b), the provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply to any rule or order issued under this Act having the applicability and effect of a rule as defined in section 551(4) of title 5, United States Code; except that sections 554, 556, and 557 of such title 5 shall not apply to any order under such section 301, 302, or 303.

(b) OPPORTUNITY FOR ORAL PRESENTATIONS.—To the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded with respect to any proposed rule or order described in subsection (a) (other than an order under section 301, 302, or 303). To the maximum extent practicable, such opportunity shall be afforded before the effective date of such rule or order. Such opportunity shall be afforded no later than 30 days after such date in the case of a waiver of the entire comment period under section 553(d)(3) of title 5, United States Code, and no later than 45 days after such date in all other cases. A transcript shall be made of any such oral presentation.

(c) ADJUSTMENTS.—The Commission or any other Federal officer or agency authorized to issue rules or orders described in subsection (a) (other than an order under section 301, 302, or

303) shall, by rule, provide for the making of such adjustments, consistent with the other purposes of this Act, as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens. Such rule shall establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, exception to, or exemption from, such applicable rules or orders. If any person is aggrieved or adversely affected by the denial of a request for adjustment under the preceding sentence, such person may request a review in accordance with section 506 when such denial becomes final. The officer or agency shall, by rule, establish procedures, including an opportunity for oral presentation of data, views, and arguments, for considering requests for adjustment under this subsection.

(d) PROCEDURES APPLICABLE FOR INCREMENTAL PRICING DETERMINATIONS RESPECTING IMPORTS.—Notwithstanding the preceding provisions of this section, any determination made under section 207(c) shall be made in accordance with the procedures applicable to the granting of any authority under the Natural Gas Act to import natural gas or liquefied natural gas (as the case may be). [15 U.S.C. § 3412 (Supp. IV 1980)]

DEPARTMENT OF ENERGY ORGANIZATION ACT

SEC. 402. (a)(1) There are hereby transferred to, and vested in, the Commission the following functions of the Federal Power Commission or of any member of the Commission or any officer or component of the Commission:

* * *

(E) the establishment, review, and enforcement of curtailments, other than the establishment and review of priorities for such curtailments, under the Natural Gas Act;

* * *

(h) The Commission is authorized to prescribe rules, regulations, and statements of policy of general applicability with respect to any function under the jurisdiction of

the Commission pursuant to section 402. [42 U.S.C. § 7172 (Supp. IV 1980)]

II. EXCERPTS FROM LEGISLATIVE HISTORY OF THE NATURAL GAS POLICY ACT OF 1978

Statements Of The Sponsors Of The Original Senate Amendment Providing For An Agricultural Priority

123 Cong. Rec. S15,160 (Daily Ed. Sept. 16, 1977)

The intent of this section is to specify by statutory language those categories of service to receive natural gas in order of priority pursuant to Federal curtailment plans. New section 25 does not expand the statutory scope as judicially construed, of current curtailment authority

. . . .

Conference Report

H.R. Rep. No. 95-1752, 95th Cong. 2d Sess. 113 (1978)

Once the schedule of curtailment priorities is brought into conformity with the requirements of this Act, the Commission will be required to implement the revised curtailment priority schedule applicable to interstate pipelines. For purposes of implementing this section, the Commission is instructed to reopen curtailment plans that are already in effect under the Natural Gas Act only to the extent necessary to adjust those plans to bring them into conformity with the new curtailment priority schedule. The conferees were concerned that these changes not burden the Commission with lengthy proceedings, which might throw existing curtailment plans into disarray. Therefore, the conference agreement includes the term "to the maximum extent practicable" to assure that the Commission has the necessary flexibility in implementing any changes. For example, the conferees do not intend the reopening of curtailment plans for this limited purpose to result in adoption of a new base year for curtailment purposes.